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STOUGH v. CRENSHAW COUNTY BOARD OF EDUCATION: PARENTAL RIGHTS AND SEGREGATION ACADEMIES

I. Introduction

In a recent eleventh circuit case, *Stough v. Crenshaw County Board of Education*,¹ two tenured school teachers challenged a school board policy which prohibited board employees from sending their children to private schools.² The policy provided that "no person shall be employed by the Crenshaw County Board of Education who is in violation of this policy."³ The teachers had enrolled their children in Crenshaw Christian Academy, a racially segregated academy created in the wake of public school desegregation.⁴

The school board gave four reasons for the policy: (1) to promote good relationships among teachers;⁵ (2) to prevent the detrimental effect of noncompliance on a teachers' performance;⁶ (3) to insure favorable employee-employer relationships;⁷ and (4) to facilitate desegregation of the county public school system.⁸ The court held that

1. 744 F.2d 1479 (11th Cir. 1984).

2. *Id.* at 1480.

3. *Stough v. Crenshaw County Board of Education*, 579 F. Supp. 1091, 1093 (M.D. Al. 1983).

4. *Id.* at 1093. A "segregation academy" is a "private school which operates on a racially segregated basis as an alternative for white students seeking to avoid desegregated public schools." Note, *Runyon v. McCrary: Section 1981 Opens the Doors of Discriminatory Private Schools*, 34 WASH. & LEE L. REV. 179 (1977).

5. *Stough*, 579 F. Supp. at 1096.

6. *Id.*

7. *Id.* at 1097.

8. *Id.* In response to desegregation orders in the late 1960's and early 1970's, enrollment in southern private schools increased substantially from approximately 25,000 in 1966 to 535,000 by 1972. See Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1441 (1973).

The problem of white parents avoiding court desegregation orders by withdrawing their children from public schools or by moving away from the integrating district is commonly referred to as "white flight." Farley, Richards, & Wurdock, *School Desegregation and White Flight: An Investigation of Competing Models and Their Discrepant Findings*, 53 SOC. OF EDUC. 123, 124 (1980). The problem is still present in our school systems. By 1982, the estimated enrollment in private segregation academies grew to more than one million. *Hearings on IRS Tax Exemptions and Segregated Private Schools Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary*, 97th Cong., 2d Sess. 39 (1982) (statement of Dr. Frank A. Rose, President, The L.Q.C. Lamar Society, Inc.). Segregated private academies have a negative impact on desegregation because such institutions draw white students away from the public schools. The white

a parent's right to direct the education of his child is a fundamental right.⁹ Therefore, any limitation on this right could be justified only by a showing of a compelling state interest.¹⁰ The court held that none of the four reasons advanced by the school board were sufficiently compelling to justify the policy.¹¹

This Note examines whether parents have a fundamental right to send their children to private, racially segregated academies. Part II discusses the constitutional standards to be applied in deciding whether a public employee's first amendment rights are being violated.¹² Part III discusses the rights of public school teachers as public employees.¹³ Part IV examines the interest of teachers as parents.¹⁴ In the context of whether parents have a fundamental right to send their children to private, racially segregated schools, the Supreme Court cases of *Runyon v. McCrary*¹⁵ and *Roberts v. United States Jaycees*¹⁶ will be analyzed.¹⁷ The state's interest in eradicating discrimination in education also will be discussed.¹⁸ Finally, this Note examines the question of whether a policy like that of the Crenshaw County school board is unconstitutionally overbroad.¹⁹ This Note concludes that there is no fundamental right of parents to send their children to private, racially segregated schools.

II. Constitutional Standard

A. The *Mt. Healthy* Three Step Test

The seminal case regarding the question of whether a public

students that remain in the public schools become the minority and are led to believe that they are receiving an inferior education. *Id.* at 41 (statement of Mardi A. Osman, Research and Program Officer, The L.Q.C. Lamar Society, Inc.).

In *Stough*, the school board feared that by sending their children to Crenshaw Christian Academy, the teachers were "encouraging white students to leave the public schools and attend a segregated private school." Brief for Appellant at 26, *Stough v. Crenshaw County Board of Education*, 744 F.2d 1479 (11th Cir. 1984) [hereinafter cited as Appellant's Brief]. Indeed, after the district court's decision in favor of the school teachers, enrollment at Crenshaw Christian Academy increased from 140 students to 180 students. *Id.* at 25.

9. *Stough*, 744 F.2d at 1480.

10. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

11. *Stough*, 744 F.2d at 1482.

12. See *infra* notes 20-56 and accompanying text.

13. See *infra* notes 57-102 and accompanying text.

14. See *infra* notes 103-138 and accompanying text.

15. 427 U.S. 160 (1976).

16. 104 S. Ct. 3244 (1984).

17. See *infra* notes 139-91 and accompanying text.

18. See *infra* notes 192-223 and accompanying text.

19. See *infra* notes 224-52 and accompanying text.

employee's first amendment rights had been violated by a state regulation is *Mt. Healthy City Board of Education v. Doyle*.²⁰ In *Mt. Healthy*, an untenured public school teacher was discharged after he revealed to a radio station that the school principal had adopted a dress code. The Court, while deciding that this communication was protected by the first and fourteenth amendments, nevertheless, upheld the teacher's discharge.²¹ The teacher also had been involved in several arguments with fellow employees and had made an obscene gesture at students.²² The Court found that the lower court had failed to determine whether the teacher would have been discharged in the absence of the protected conduct.²³ In reaching its conclusion, the Supreme Court employed the following three step analysis: (1) whether the plaintiff-public employee had carried the burden of proof in demonstrating that his conduct was constitutionally protected;²⁴ (2) whether the protected activity was a substantial or motivating factor in the actions taken against the plaintiff;²⁵ and (3) whether the state had defeated the plaintiff's claim by proving by a preponderance of the evidence that the same action would have been taken in the absence of the protected activity.²⁶ The issue in *Stough* concerns the first step of the *Mt. Healthy* test.²⁷

In *Stough*,²⁸ the school board denied the teachers' request for an exemption from the school board policy prohibiting its employees from sending their children to private schools.²⁹ The school board never claimed that it was dissatisfied with the plaintiffs' job performance,³⁰ their breach of the board policy prohibiting them from sending their children to private schools notwithstanding. It is apparent that the only factor motivating the denial of the teachers'

20. 429 U.S. 274 (1977).

21. *Id.* at 284-85.

22. *Id.* at 281-82.

23. *Id.* at 287.

24. *Id.*

25. *Id.*

26. *Id.*

27. The eleventh circuit in *Stough* stated: "There is no question in this case that the board's policy interferes with the plaintiffs' exercise of their constitutional right to control the education of their children." *Stough*, 744 F.2d at 1480. This Note questions whether parents have a constitutional right to send their children to racially segregated private schools.

28. See *supra* note 1.

29. *Stough*, 744 F.2d at 1480.

30. The argument of the school board was that by sending their children to a private, racially segregated school, the teachers' job performance would be impaired to a material and substantial degree. Appellant's Brief, *supra* note 8 at 7.

requests for exemption was the fact that the teachers insisted on sending their children to a racially segregated academy.³¹

The court's concern in *Stough* did not rest with the second and third steps of the *Mt. Healthy* analysis.³² The issue focused on the first step, specifically, whether the public school teachers have demonstrated that their conduct was constitutionally protected.

B. The Three Tier Analysis

When a state law infringes upon a right held by one of its citizens, a determination of whether that right is fundamental³³ is critical. If a statute invades a fundamental right, the courts will apply a strict scrutiny test, and the statute is likely to be struck down.³⁴ When a statute invades a right not deemed to be fundamental, a rational relation test will be applied, and the statute will probably be upheld.³⁵

1. Strict Scrutiny

If a right is deemed to be fundamental,³⁶ the Supreme Court has held that a regulation limiting it may be justified only by a "compelling state interest."³⁷ Moreover, the regulation "must be narrowly

31. *Id.*

32. See *supra* notes 25-26 and accompanying text.

33. Fundamental rights are those rights "with textual recognition in the Constitution, or its amendments, or values found to be implied because they are 'fundamental' to freedom in American society, as reflected by history and the interpretation of the Supreme Court." J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 539 (2d ed. 1983) [hereinafter cited as NOWAK].

34. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

35. B. SCHWARTZ, CONSTITUTIONAL LAW § 9.5 (2d ed. 1979).

36. When a right is infringed upon by a state, the fourteenth amendment is invoked:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court held that the rights of "life, liberty, and property" included not only those enumerated in the Bill of Rights but also rights which are implicit in the first ten amendments, such as a right to privacy. *Id.*, at 484-86. In reaching this conclusion, the Court relied on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), in stating that "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." *Id.* at 482.

37. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

drawn to express only [the] legitimate state interests at stake.”³⁸ This is a strict scrutiny test.³⁹ That is, if a right is protected by the Constitution, the Supreme Court will carefully scrutinize the infringement on that right to see if the regulation is justified by a compelling state interest.⁴⁰

2. *Minimal Rationality*

When rights are deemed not to be fundamental, a less stringent test is applied.⁴¹ In *United States v. Carolene Products Co.*,⁴² sustaining a federal prohibition on the interstate shipment of imitation milk,⁴³ the Court held that the economic regulation was presumptively valid, and only the existence of a rational basis for the legislation need be shown.⁴⁴ This minimal rationality test gives wide deference to the governmental regulation.⁴⁵

3. *Intermediate Tier*

The intermediate level of scrutiny developed by the Supreme Court in *Morey v. Doud*,⁴⁶ did not require the state to prove a compelling state interest.⁴⁷ In *Morey*, an Illinois act⁴⁸ which exempted the American Express Company from licensing and regulation requirements was held to be a violation of the equal protection clause of the fourteenth amendment.⁴⁹ The Court stated that “a statutory discrimination must be based on differences that are reasonably related

38. *Id.* at 155.

39. According to Professor Laurence H. Tribe, the idea of strict scrutiny acknowledges that political choices which burden fundamental rights or suggest prejudice against racial or other minorities, “must be subjected to close analysis in order to preserve substantive values of equality and liberty.” L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6 (1978).

40. *Roe v. Wade*, 410 U.S. at 155.

41. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147 (1938).

42. *Id.*

43. *Id.* at 152-54.

44. *Id.*

45. *Id.*

46. 354 U.S. 457 (1957).

47. The Court stated that “a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found.” *Id.* at 465.

48. The Illinois Community Currency Exchange Act, 1943 Ill. Laws 233. American Express Company money orders did not fall under the definition of “community currency exchange.” 1947 Ill. Laws 307, § 1.

49. *Morey v. Doud*, 354 U.S. at 469.

to the purposes of the Act in which it is found.”⁵⁰ Under this test, a state must show something more than a rational basis for the regulation; there must be a rational relation between the regulation and the objective it seeks to achieve.

The Court has applied this intermediate test when a state regulation was alleged to have been a violation of the due process clause.⁵¹ In *Kelley v. Johnson*,⁵² the Court upheld a Suffolk County, New York regulation which limited the hair length of police officers.⁵³ Assuming that matters of personal appearance were liberty interests within the ambit of the due process clause,⁵⁴ the Court found that the state had a duty to protect the safety of persons and property.⁵⁵ Since there was a rational connection between the regulation and the objective of promoting the safety of persons and property, the regulation was upheld.⁵⁶

III. The Rights of Teachers as Public Employees

The Supreme Court formerly held that persons seeking employment in the public schools had no right to do so on their own terms.⁵⁷ This meant that public employment could be conditioned on the surrender of constitutional rights.⁵⁸ However, the Court has discarded

50. *Id.* at 465. However, in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), the Supreme Court overruled *Morey v. Doud* and did not apply a rational connection test to an economic regulation. In *Dukes*, a New Orleans ordinance prohibited pushcart vendors from selling foodstuffs in the city's French quarter, but exempted from its prohibition vendors who had operated a pushcart business within the French quarter for eight years prior to January 1, 1972. *Dukes*, 427 U.S. at 298. After noting that the ordinance was purely an economic regulation, the Court upheld the ordinance stating:

States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . .

Id. at 303.

Morey v. Doud, a case in which the Supreme Court applied a rational relation test and not a minimal rationality test to an economic regulation, was overruled. *Id.* at 306. The case has been discussed on this Note only to introduce and illustrate the rational relation test.

51. *Kelley v. Johnson*, 425 U.S. 238 (1976).

52. *Id.*

53. *Id.* at 249.

54. *Id.* at 244.

55. *Id.* at 247.

56. *Id.*

57. *Adler v. Bd. of Educ.*, 342 U.S. 485, 492 (1952).

58. *Id.*

this premise.⁵⁹ In *Keyishian v. Board of Regents*,⁶⁰ the Court absolutely rejected the theory that public employment could be premised on any conditions regardless of how unreasonable.⁶¹ While there is no constitutionally protected right to teach in a public school,⁶² a teacher may not be deprived of a position for a constitutionally impermissible reason.⁶³

The constitutional rights of teachers are not absolute.⁶⁴ For example, a state can limit a public school teacher's first amendment right to freedom of speech to a greater degree than it can limit a non-public employee's right to freedom of speech.⁶⁵ In *Pickering v. Board of Education*,⁶⁶ the Court provided a balancing test in which "the interests of the teacher, as a citizen, in commenting upon matters of public concern"⁶⁷ were balanced against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."⁶⁸

In *Pickering*, a teacher wrote a letter to a newspaper criticizing the school board's allocation of school funds between educational and athletic programs.⁶⁹ The letter was later published by the local newspaper.⁷⁰ The Court held that a teacher's exercise of his right to speak on issues of public importance could not furnish the basis for his dismissal from public employment.⁷¹ The teacher's exercise of his right to speak on public matters outweighed the state's interest in having loyal employees.⁷² A public school teacher's constitutionally protected right of free speech recently has been expanded by the courts to encompass speech concerning internal matters not related to any issue of public importance.⁷³

59. See *infra* notes 60-73 and accompanying text.

60. 385 U.S. 589 (1967).

61. *Id.* at 605-06.

62. *Adler*, 342 U.S. at 492.

63. *Keyishian v. Bd. of Regents*, 385 U.S. at 605-06.

64. See *infra* notes 65-103 and accompanying text.

65. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

66. *Id.*

67. *Id.* at 568.

68. *Id.*

69. *Id.* at 566.

70. *Id.*

71. *Id.* at 574-75.

72. *Id.* at 571-72.

73. See *White v. South Park Indep. School Dist.*, 693 F.2d 1163, 1168 n.7 (5th Cir. 1982) (teacher's speech is not necessarily unprotected because it concerns internal operating procedures rather than issues of public importance); *Brown v. Bullard Indep. School Dist.*, 640 F.2d 651, 653 (5th Cir.), *cert. denied*, 454 U.S. 828 (1981) (teacher's conversation with principal of public school which related to conditions of employment was protected by first amendment).

However, a teacher's right to freedom of speech is not unlimited.⁷⁴ A state's interest in promoting the efficiency of its public services may outweigh a teacher's right to free speech if the expression results in a material and substantial⁷⁵ interference with the requirements of appropriate discipline in the operation of a school.⁷⁶ In *Anderson v. Evans*,⁷⁷ a tenured public school teacher was dismissed for "'conduct unbecoming a teacher'"⁷⁸ after she stated to the principal that she hated all blacks.⁷⁹ The teacher taught in an all black school and subsequent to her statement, witnesses testified that her effectiveness as a teacher declined,⁸⁰ and that she showed hostility toward the principal.⁸¹ The sixth circuit held that the school board's interest in maintaining an efficient system outweighed the teacher's interest in making derogatory remarks.⁸²

Federal courts also have protected public school teachers' first amendment right to freely associate. For example, in *Lake Park Education Association v. Board of Education of Lake Park*,⁸³ the right of a school teacher to be a member of a union was protected.⁸⁴ In another situation, the tenth circuit in *Childers v. Independent School District No. 1 of Bryan County*⁸⁵ protected a public school teacher's right to help organize a union.⁸⁶

There have been cases in which the courts have ruled in favor of state regulations that infringed on the rights of teachers.⁸⁷ For example, in *Sullivan v. Meade Independent School District*,⁸⁸ a teacher was dismissed because she insisted on cohabitation with a man after the school board warned her not to do so.⁸⁹ The eighth circuit upheld

74. See *infra* notes 75-81 and accompanying text.

75. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 509 (1969).

76. *Id.* at 509. A material and substantial interference would be conduct which would disrupt classwork or invade the rights of others. *Id.* at 513.

77. 660 F.2d 153 (6th Cir. 1981).

78. *Id.* at 155.

79. *Id.*

80. *Id.* at 156.

81. *Id.* "Often when he [the principal] encountered Mrs. Anderson and spoke to her she would just turn her head and look away." *Id.*

82. *Id.* at 159.

83. 526 F. Supp. 710 (N.D. Ill. 1981).

84. *Id.* at 717.

85. 676 F.2d 1338 (10th Cir. 1982).

86. *Id.* at 1341-42.

87. See *infra* notes 88-103 and accompanying text.

88. 530 F.2d 799 (8th Cir. 1976).

89. *Id.* at 802.

the dismissal, finding that there was some basis for the school board's concern that the teacher's conduct might have an adverse effect on her students.⁹⁰ Moreover, the court held that, although there is a fundamental right to privacy,⁹¹ a sexual relationship outside of marriage is not constitutionally protected.⁹²

In *Norbeck v. Davenport Community School District*,⁹³ the eighth circuit held that the interest of the school board in efficient school administration was paramount to a high school principal's right to act as chief negotiator for a teachers' union.⁹⁴ Recently, the reassignment of a graduate assistant from teaching to research, after it was discovered that she was having a homosexual relationship with a student who was not in any of her classes, also was upheld.⁹⁵ Finally, in *Cook v. Hudson*⁹⁶ the fifth circuit held that the failure of a school board to rehire nontenured public school teachers because they had enrolled their children in a private, racially segregated school was not a violation of the first or fourteenth Amendments.⁹⁷

Each of the three judges deciding the case wrote separate opinions. Judge Coleman, writing for the majority, stated that the Constitution did not deny a public school board the authority to adopt a policy to ensure the undivided dedication of its teachers.⁹⁸ Judge Roney agreed with the holding but on a narrow ground. Since the teachers were untenured, they had the burden of proving that the school board's action in not rehiring them was unconstitutional.⁹⁹ The teachers did not meet this burden.¹⁰⁰

Judge Clark dissented,¹⁰¹ stating that a fundamental right was involved, specifically, the right of parents to direct the upbringing and education of their children.¹⁰² Since the school board could not show that the job performance of the teachers had declined, the necessary compelling state interest was not present.¹⁰³

90. *Id.* at 808.

91. *Id.* at 806.

92. *Id.*

93. 545 F.2d 63 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977).

94. *Id.* at 67.

95. *Naragon v. Wharton*, 572 F. Supp. 1117, 1124 (M.D. La. 1983), *aff'd*, 737 F.2d 1403 (5th Cir. 1984).

96. 511 F.2d 744 (5th Cir. 1975), *cert. denied*, 429 U.S. 165 (1976).

97. *Id.* at 749 (Coleman, J., concurring).

98. *Id.*

99. *Id.* at 749-50 (Roney, J., concurring).

100. *Id.* at 750.

101. *Id.* (Clark, J., dissenting).

102. *Id.*

103. *Id.* at 751-57.

IV. The Interest of Teachers as Parents

A. The Right of Parents to Direct the Upbringing and Education of Their Children

That parents have a fundamental right to direct the upbringing and education of their children is unquestionable. This right has been recognized by the Supreme Court in *Meyer v. Nebraska*¹⁰⁴ and *Pierce v. Society of Sisters*.¹⁰⁵ In *Meyer*, a state law prohibiting the teaching of foreign languages to children who had not completed the eighth grade was struck down.¹⁰⁶ The Court held that the law impermissibly interfered with "the power of parents to control the education of their own [children]." ¹⁰⁷ In *Pierce* the Court invalidated an Oregon law which required parents to send their children to public schools under pain of criminal penalty.¹⁰⁸ The fundamental right of the parent to send his child to a private school also was recognized by the Court.¹⁰⁹

This same right again was acknowledged in *Wisconsin v. Yoder*.¹¹⁰ Members of the Old Order Amish religion refused to comply with a Wisconsin compulsory school attendance law which required parents to cause their children under the age of sixteen to attend public or private school.¹¹¹ The Amish parents declined to send their children to school beyond the eighth grade because they believed that secondary school attendance was contrary to the Amish way of life.¹¹²

The Court held in favor of the Amish parents, stating that the Wisconsin law compelled the parents to perform acts undeniably at odds with fundamental tenets of their religious belief and thus deprived them of the free exercise of their religion.¹¹³ The State of Wisconsin contended that a system of mandatory education was compelling for two reasons. First, some degree of education is necessary to prepare citizens to participate effectively in an open

104. 262 U.S. 390 (1923).

105. 268 U.S. 510 (1925).

106. *Meyer*, 262 U.S. at 403.

107. *Id.* at 401.

108. *Pierce*, 268 U.S. at 534-35.

109. *Id.*

110. 406 U.S. 205 (1972).

111. *Id.* at 207.

112. *Id.* at 210. Specifically, Old Order Amish communities believed that "salvation requires life in a church community separate and apart from the world and worldly influence." *Id.*

113. *Id.* at 219.

political system.¹¹⁴ Second, education prepares individuals to be self-sufficient members of society.¹¹⁵ The Court, however, found that the Amish traditionally were productive, law-abiding members of society, and that they provided their own vocational education during their children's adolescent years.¹¹⁶ Therefore, the Court held that the Wisconsin compulsory attendance law was not compelling as to the Amish.¹¹⁷ Finally, the Supreme Court emphasized that the primary role of parents in the upbringing of their children is an established American tradition.¹¹⁸

However, a state does have the right to interfere with the parent-child relationship in order to protect the health and safety of the child.¹¹⁹ In *Prince v. Massachusetts*,¹²⁰ a state statute¹²¹ prohibited minors from distributing newspapers, magazines, periodicals, or other

114. *Id.* at 221.

115. *Id.*

116. *Id.* at 225.

117. *Id.*

The independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

Id. at 226-27.

118. *Id.* at 232. However, in his concurrence, Justice White cautioned that the right of parents to direct the upbringing of their children was not absolute. "*Pierce v. Society of Sisters* lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" *Id.* at 239 (White, J., concurring) (citation omitted). In *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub. nom.* *Coit v. Green*, 404 U.S. 997 (1971), the district court stated that the parental right to control the education of their children was not without limit. *Green*, 330 F. Supp. at 1167. "The parent cannot assert an absolute freedom to remove his child from all schooling, or to send him to a school where the curriculum includes not only mathematics but also the desirability and techniques of immediate violent overthrow of the government." *Id.*

119. This right derives from the state's power of *parens patriae*. *Parens patriae* refers to the state's limited paternalistic power to protect or promote the welfare of certain individuals, such as young children and mental incompetents, who lack the capacity to act in their own best interests. *Developments in the Law, The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980).

120. 321 U.S. 158 (1944).

121. Section 80 of the statute provided:

Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after

merchandise while standing on public streets.¹²² The statute also made it unlawful for a parent or guardian to permit a minor to work in violation of this law.¹²³

A Jehovah's Witness who had allowed her children to sell religious materials in public challenged the statute, claiming that it violated her freedom of religion under the first amendment as well as her parental rights under the due process clause of the fourteenth amendment.¹²⁴ The Court rejected this claim and upheld the statute, finding that "the family is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation."¹²⁵ The Court held that "the state's authority over children's activities is broader than over like actions of adults,"¹²⁶ and the interest of the state in protecting children from the harmful effects of child employment was valid.¹²⁷

In *Ginsberg v. New York*,¹²⁸ a New York statute¹²⁹ prohibiting

having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.

MASS. ANN. LAWS ch. 149, § 80 (Michie/Law. Co-op. 1976). Section 81 provided:

Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, . . . shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; and for a subsequent offence by a fine of not less than five nor more than twenty-five dollars or by imprisonment for not more than ten days, or both.

MASS. ANN. LAWS ch. 149, § 81 (Michie/Law. Co-op. 1976).

122. *Prince*, 321 U.S. at 160-61.

123. *Id.* at 161.

124. *Id.* at 164.

125. *Id.* at 166.

126. *Id.* at 168.

127. *Id.* at 168-69.

128. 390 U.S. 629 (1968).

129. The statute provided:

It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor: (a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or (b) any book, pamphlet, magazine, printed matter however produced, or sound recording which contains any matter enumerated in paragraph (a) . . . , or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado—masochistic abuse and which, taken as a whole, is harmful to minors.

1965 N.Y. Laws ch. 327, § 2.

the sale of pornographic pictures to a minor under the age of seventeen was upheld.¹³⁰ Again, the Supreme Court affirmed the interest of the state in protecting the well-being of its youth¹³¹ and held that prohibiting the sale of pornographic pictures to minors was rationally related to the objective of safeguarding such minors from harm.¹³²

In a 1976 case, *Planned Parenthood of Missouri v. Danforth*¹³³, the Supreme Court recognized the right of an infant to have an abortion without the consent of her parents.¹³⁴ A section of the Missouri Public Health and Welfare statute¹³⁵ required the written consent of a parent or person *in loco parentis* as a condition for an unmarried minor's abortion during the first twelve weeks of her pregnancy.¹³⁶ The State of Missouri argued that the purpose of the statute was to protect the welfare of minors.¹³⁷ However, the Court struck down the section, holding that there was no significant state interest in conditioning an abortion on the consent of a parent.¹³⁸ Such a requirement would not serve to strengthen the family unit, nor would it enhance parental authority.¹³⁹

B. Application of Supreme Court Precedent in *Stough*

In *Stough*, the eleventh circuit stated that the school board policy prohibiting employees from sending their children to private schools

130. *Ginsberg*, 390 U.S. at 633.

131. *Id.* at 640.

132. *Id.* at 643.

133. 428 U.S. 52 (1976).

134. *Id.* at 75.

135. 1974 Mo. Laws 810.

136. Section 3 provided:

No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except: . . . (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

1974 Mo. Laws 810.

137. *Planned Parenthood*, 428 U.S. at 72.

138. *Id.* at 75; see also *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (Massachusetts consent statute struck down because it did not afford pregnant minor opportunity to receive independent judicial determination that she was mature enough to consent or that abortion would be in her best interest).

139. *Planned Parenthood*, 428 U.S. at 75. See generally Ford, *The Evolution of a Constitutional Right to an Abortion*, 4 J. LEGAL MED. 271 (1983) (discussion of constitutional right to have an abortion); Comment, *Abortion: From Roe to Akron*, *Changing Standards of Analysis*, 33 CATH. U.L. REV. 393 (1984) (discussion

interfered with the teachers' exercise of their constitutional right as parents to control the education of their children.¹⁴⁰ The court failed to consider the question of whether sending children to segregated academies falls within the penumbra of this constitutional right.¹⁴¹ To answer this inquiry it is necessary to examine the Supreme Court's decision in *Runyon v. McCrary*¹⁴² and *Roberts v. United States Jaycees*,¹⁴³ concerning the question of whether an organization could use the first amendment right to freedom of association to protect its discriminatory admissions policy.

1. *Runyon v. McCrary*

In *Runyon v. McCrary*,¹⁴⁴ two black children brought actions against private schools in Virginia after they were denied admission for the stated reason that the schools were not integrated.¹⁴⁵ The Supreme Court held that section 1981 of the Civil Rights Act of 1866,¹⁴⁶ which forbids racial discrimination in the making and enforcing of private contracts,¹⁴⁷ prohibits private schools from denying admission to prospective students because the students are black.¹⁴⁸ The Court held that racially discriminatory admissions policies denied blacks this right to contract.¹⁴⁹

As a defense, the private academies asserted the right of white parents to freedom of association, the right of privacy, and the right of parents to direct the education of their children.¹⁵⁰ The

of state's ability to regulate abortion process); Note, *The Abortion Decision for Minnesota Minors: Who Decides?*, 9 WM. MITCHELL L. REV 194 (1984) (discussion of Minnesota's parental notification statute).

140. *Stough*, 744 F.2d at 1480.

141. See *supra* note 27.

142. 427 U.S. 160 (1976).

143. 104 S. Ct. 3244 (1984).

144. 427 U.S. 160 (1976).

145. *Id.* at 165.

146. 42 U.S.C. § 1981 (1982).

147. Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

148. *Runyon*, 427 U.S. at 172.

149. *Id.* at 172-73.

150. *Id.* at 175.

Court found that section 1981 did not violate these rights.¹⁵¹ A first amendment right to freedom of association was recognized as was the right of parents to send their children to private schools which promote the belief that racial segregation is desirable.¹⁵² However, the Court stated that "it d[id] not follow that the practice of excluding racial minorities from such institutions [was] also protected by the same principle."¹⁵³

The Court further decided that the discontinuance of the discriminatory practice would not violate any parental rights recognized in *Meyer* and *Pierce*.¹⁵⁴ The Court stressed that the limited scope of *Pierce* simply affirmed the right of private schools to exist.¹⁵⁵ Indeed, in *Pierce*,¹⁵⁶ the Court stated that there were interests of the state which would override the rights of parents. For example, the state has the power to reasonably regulate private schools,¹⁵⁷ to supervise and examine teachers and students,¹⁵⁸ and to require that nothing be taught which is manifestly inimical to the public welfare.¹⁵⁹

In its discussion of the right of privacy, the Court decided that government is not necessarily restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.¹⁶⁰ While parents have a constitutional right to send their children to private schools and a right to select private schools that offer specialized insructions,¹⁶¹ the Court insisted that parents do not have a constitutional right to provide their children with private school education unfettered by reasonable government reg-

151. *Id.* at 175-79.

152. *Id.* at 175-76.

153. *Id.* at 176.

154. *Id.* at 177.

155. *Id.*

156. 268 U.S. 510 (1925).

157. *Id.* at 534.

158. *Id.*

159. *Id.*; see also *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (states have power to pass compulsory school-attendance statutes to promulgate reasonable standards in education); *In re Sawyer*, 234 Kan. 436, 442, 672 P.2d 1093, 1098 (1983) (compulsory school attendance laws have rational relationship to legitimate state purpose of educating its children); *State v. Faith Baptist Church*, 207 Neb. 802, 816-17, 301 N.W.2d 571, 579, *appeal dismissed* 454 U.S. 803 (1981) (parents have right to send their children to non-public schools but do not have right to be completely unfettered by reasonable government regulations as to quality of education furnished); *State v. Shaver*, 294 N.W.2d 883, 889 (N.D. 1980) (states' compelling interest in providing education for its people outweigh parents' religious conviction against use of certified teachers).

160. *Runyon v. McCrary*, 427 U.S. at 178.

161. *Id.*

ulation.¹⁶² Indeed, many states now have statutes which prohibit some or all private schools from engaging in racially discriminating practices.¹⁶³

The holding in *Runyon v. McCrary* is composed of two basic tenets. First, private schools cannot discriminate according to race in their admissions policies. Second, the application of Section 1981 in prohibiting racial discrimination does not infringe on any parental rights.¹⁶⁴ Therefore, if a private school were forced to admit blacks, the rights of white parents who are sending their children to this racially segregated school would not be violated. It is logical to conclude that parents do not have a constitutionally protected right to send their children to racially segregated schools.¹⁶⁵

162. *Id.* at 176-77.

163. See COLO. REV. STAT. § 24-34-601(1), (2) (1982); IDAHO CODE §§ 67-5902(10), 67-5909(6) (Supp. 1984); INDIANA ANN. STAT. §§ 22-9-1-2(a), 22-9-1-3(l) (Burns Supp. 1984); MASS. ANN. LAWS ch. 151C, §§ 1(b), 2(a)(1976); MICH. COMP. LAWS ANN. §§ 37.2401, 37.2402 (West Supp. 1985); MINN. STAT. ANN. §§ 363.01(20), 363.03(5) (Supp. 1984); N.J. STAT. ANN. § 10: 5-5(1) (West Supp. 1985); N.Y. EXEC. LAW § 296-4 (McKinney 1982); PA. STAT. ANN. tit. 24 § 5003(1) (1974), § 5004(a)(1) (Supp. 1984); UTAH CODE ANN. §§ 34-35-2(11), 34-35-6(f) (Supp. 1983).

164. *Runyon*, 427 U.S. at 176-77.

165. The commentators have agreed that since *Runyon*, white parents do not have a constitutional right to send their children to private, racially segregated academies. See Goldstein, *Death and Transfiguration of the State Action Doctrine—Moose Lodge v. Irvis* to *Runyon v. McCrary*, 77 HASTINGS CONST. L.Q. 1, 28 n.140 (1977); Comment, *Desegregating Private Schools Under Section 1981*, 41 ALB. L. REV. 759, 770 (1977); Note, *Civil Rights: Section 1981 Right to Contract as a Bar to Racial Discrimination in Private Schools*, 31 ARK. L. REV. 314, 320-21 (1977); Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412, 437-40 (1976); Note, *Section 1981 and the Thirteenth Amendment After Runyon v. McCrary—On the Doorsteps of Discriminatory Private Clubs*, 29 STAN. L. REV. 747, 766-68 (1977); Note, *Civil Rights—Race Discrimination—Section 1981 Applicable to Private School Admissions*, 25 U. KAN. L. REV. 247, 249 (1977); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination*, 84 YALE L.J. 1441, 1460 (1975).

It is questionable whether a private, sectarian school would be allowed to refuse to admit black children under a freedom of religion argument. In *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), the fifth circuit affirmed the issuance of an injunction which enjoined a private, sectarian school from barring two black children from enrolling in the school because of their race. The court found that the segregation policy of the sectarian school was not religiously based because it had been recently instituted, could be changed by a majority vote of church members, and was not central to church doctrine. *Id.* at 312-13. In *Fiedler v. Marumscos Christian School*, 631 F.2d 1144 (4th Cir. 1980), a white girl was expelled from a private, sectarian school for having a romantic relationship with a black student. The school asserted that the action was based on a bona fide religious belief that interracial romantic relationships were undesirable and should

The rights of white parents wishing to send their children to segregated academies can be analyzed another way. In the context of freedom of association, it has been suggested that there is a distinction between "primary" and "secondary" relationships.¹⁶⁶ A primary relationship, which is characterized by highly personal, intimate association, should never be inhibited by law.¹⁶⁷ A secondary relationship is characterized by impersonal, highly formalized relations between people.¹⁶⁸ These relationships are deemed less important, and thus, in the formation of such a relationship, society can demand that the individual eliminate from consideration any factors such as race, creed, color, or sex which have no bearing upon the relationship.¹⁶⁹

If the argument that the relationship between parents and their children is highly personal and intimate¹⁷⁰ is valid, government should be unable to regulate this relationship.¹⁷¹ However, this argument is flawed. While the decision of a parent to send a child to a segregated academy is highly personal, that decision inevitably leads to the creation of a public institution because a private school holds itself out to the general public through an offer of its facilities.¹⁷² Once such an offer is made public, the school has set forth its willingness

be protected by the free exercise clause. *Id.* at 1147-51. The court disagreed, however, finding that this belief belonged solely to the school's principal and was not a precept of the religion. *Id.* at 1152-53.

166. Sengstock and Sengstock, *Discrimination: A Constitutional Dilemma*, 9 WM. & MARY L. REV. 59, 117 (1967) [hereinafter *Discrimination*].

167. *Id.* at 117. *But see* Note, *Section 1981 and Discrimination in Private Schools*, 1976 DUKE L.J. 125, 145 (1976). The state does have the power to regulate even the most primary relationships. *Id.*

168. *Discrimination supra* note 166, at 117-18. An example of a secondary relationship is the relation between a buyer and a seller. *Id.* at 117.

169. *Id.* at 118.

170. A primary relationship is the type of relationship "which one may have with his spouse, his closest friends, his parents, and perhaps his siblings." *Id.* at 117.

171. *Id.*

172. The lower court in *Runyon* stated that the private schools were public in nature. *McCrary v. Runyon*, 515 F.2d 1082, 1088 (4th Cir. 1975).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those

to establish secondary relationships and its freedom to discriminate may therefore be curtailed.¹⁷³

2. *Roberts v. United States Jaycees*

In *Roberts v. United States Jaycees*,¹⁷⁴ the Supreme Court upheld the Minnesota Human Rights Act,¹⁷⁵ which provides that it is an unfair discriminatory practice to deny any person the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex.¹⁷⁶ The objective of the United States Jaycees (Jaycees), a national, non-profit membership corporation, is to promote and foster the growth and development of young men's civic organizations in the United States.¹⁷⁸ In 1974 and 1975, the Minneapolis and St. Paul chapters of the Jaycees began admitting women as members, in violation of the national organization's by-laws.¹⁷⁸ The national organization imposed sanctions on the two local chapters and later brought suit against various state officials to prevent the enforcement of the Minnesota Human Rights Act.¹⁷⁹ The Jaycees claimed that by requiring the organization to accept women as regular members, application of the Act would violate the male members' constitutional right to freedom of association.¹⁸⁰

Writing for the majority, Justice Brennan recognized that freedom of association is a fundamental element of personal liberty¹⁸¹ and that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role such relationships [play] in safeguarding the

applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Id.

173. *Discrimination*, *supra* note 166, at 120.

174. 104 S. Ct. 3244 (1984).

175. MINN. STAT. ANN. § 363.03(3) (West Supp. 1985).

176. *Id.* A place of public accommodations is defined as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." MINN. STAT. ANN. § 363.01(18) (West Supp. 1985).

177. *United States Jaycees*, 104 S. Ct. at 3247.

178. *Id.* at 3247-48.

179. *Id.* at 3248.

180. *Id.*

181. *Id.* at 3249.

individual freedom that is central to our constitutional scheme."¹⁸² However, all relationships do not have the same degree of intimacy. There is a spectrum from the most intimate to the most attenuated of personal relationships,¹⁸³ and determining the limits of state authority over an individual's freedom to enter into a particular association entails a careful assessment of where that relationship's objective characteristics locate the relationship on the spectrum.¹⁸⁴

The Supreme Court found that since the local chapters were neither small nor selective in judging applicants for membership, except for the denial of membership to women, the Jaycees chapters lacked the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.¹⁸⁵ Moreover, Justice Brennan emphasized that Minnesota had a compelling interest in eradicating discrimination against its female citizens¹⁸⁶ because such acts cause unique, social evils.¹⁸⁷

The Effect of the *Runyon v. McCrary* and *Roberts v. United States Jaycees* Holdings

The holdings in both *Runyon v. McCrary* and *Roberts v. United States Jaycees* suggest that, while the Supreme Court recognized the constitutional right to freedom of association, the right of privacy, and the right of parents to direct the education of their children, none of these rights are absolute. In both cases, the Court balanced the interest of private individuals to discriminate against the government's interest in eradicating discrimination.¹⁸⁸ In each case, the Court upheld the statute which sought to eliminate discrimination.¹⁸⁹ The Court will not recognize a constitutional right to discriminate

182. *Id.*

183. *Id.* at 3251.

184. *Id.*

185. *Id.*

186. *Id.* at 3253.

187. *Id.* at 3255.

188. *Runyon*, 427 U.S. at 177-79; *United States Jaycees*, 104 S. Ct. at 3252-55. For a discussion of the right to discriminate, see Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974). For a discussion of the states' obligation to end segregation in education, see Chemerinsky, *Ending the Dual System of American Public Education: The Urgent Need for Legislative Action*, 32 DEPAUL L. REV. 77 (1983).

189. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Section 1982 of the Civil Rights Act of 1870 prohibited discrimination by private individuals in sale of property).

if that right would lead to discrimination in essentially public institutions such as schools and national organizations¹⁹⁰ because the government's interest in eliminating discrimination is too great.¹⁹¹

V. The State's Interest

The Supreme Court has long held that state governments have a responsibility and a duty to maintain integrated public school systems.¹⁹² In *Brown v. Board of Education*,¹⁹³ the Court found that segregation in public schools had a detrimental effect on black children¹⁹⁴ because it generated in those black children a feeling of

190. *But see* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In *Moose Lodge*, a black man was refused service at a private club's dining room solely because of his race. The plaintiff sued contending that, since the Pennsylvania liquor board issued a liquor license to the private club, the discrimination constituted state action and was a violation of the equal protection clause. The Supreme Court held that this minimal state involvement was not sufficient to constitute "state action," and a violation of the equal protection clause was not found. *Id.*, at 171-72. The distinction between *Runyon* and *Moose Lodge* lies in the fact that the schools in *Runyon* were public in nature while the club in *Moose Lodge* was distinctly private. NOWAK, *supra* note 33 at 847.

191. See *infra* notes 192-224 and accompanying text for discussion of government's interest in eradicating discrimination.

192. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (affirmative duty to desegregate requires that school district not use policies and practices either to impede desegregation or to perpetuate or re-establish dual system); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 (1979) (school boards have continuing affirmative duty to disestablish racially based dual systems); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 191 (1973) (use of techniques such as manipulation of student attendance zones and school site selection created racially segregated schools throughout school district and thereby entitled petitioners to decree directing desegregation of entire school district); *Davis v. Bd. of School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) (school authorities should make every effort to achieve greatest possible degree of actual desegregation taking into account particulars of situation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-19 (1971) (first remedial responsibility of school boards is to eliminate invidious racial distinctions with regard to faculty, staff, transportation, extracurricular activities, and facilities); *Green v. County Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968) (school boards have affirmative duty to take whatever steps might be necessary to convert unitary system in which racial discrimination would be eliminated); *Bradley v. School Bd. of City of Richmond*, 382 U.S. 103, 105 (1965) (delays in desegregating school system were not tolerable); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 229-32 (1964) (closing of public schools while simultaneously granting tuition credits and tax concessions to white children in private, segregated schools denied black children equal protection of laws guaranteed by fourteenth amendment); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (racially segregated public schools maintained pursuant to state law violated rights of black school children guaranteed by equal protection clause of fourteenth amendment).

193. 347 U.S. 483 (1954).

194. *Id.* at 494.

inferiority.¹⁹⁵ Segregation in private schools has been deemed “invidious”¹⁹⁶ and attempts by state governments to foster such segregation have been struck down.¹⁹⁷

In *Norwood v. Harrison*,¹⁹⁸ the State of Mississippi provided textbooks to private schools, without reference to whether any participating private school had a racially discriminatory admissions policy.¹⁹⁹ Many private, segregated academies which were established in response to desegregation orders,²⁰⁰ received direct aid from the state in the form of textbooks.²⁰¹ The Court enjoined the practice of lending textbooks to racially discriminatory private schools²⁰² and declared that the state has an obligation not to support discrimination in education.²⁰³

The Court also discussed the invalidity of state aid to private, racially segregated schools in *Gilmore v. City of Montgomery*²⁰⁴ in which the city had granted segregated private schools exclusive access to local parks and recreation facilities.²⁰⁵ An injunction, preventing such access, was upheld in part by the Court²⁰⁶ which stated that the city’s actions enhanced the attractiveness of segregated private

195. *Id.* The Court further stated that the “separate but equal” doctrine had no place in the field of public education and that “[s]eparate educational facilities are inherently unequal.” *Id.* at 495.

196. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

197. *See infra* notes 198-209 and accompanying text.

198. 413 U.S. 455 (1973).

199. *Id.* at 459.

200. *Id.* at 457.

201. *Id.*

202. *Id.* at 471. As to whether private individuals had a right to receive an education in racially segregated academies, the Court’s language is confusing. In delivering the opinion of the Court, Chief Justice Burger first stated that the case did not “raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion or of the authority of a State to allow such schools.” *Id.* at 457- 58. However, later in the opinion, Chief Justice Burger declared, “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” *Id.* at 470.

203. *Id.* at 465; *see also* *Wilmington Christian School v. Board of Educ.*, 545 F. Supp. 440, 448 (D. Del. 1982) (school board’s policy of refusing to sell surplus school buildings to private schools upheld because aid to private schools would enhance their ability to drain white students from public school system); *Poindexter v. Louisiana Financial Assistance Comm’n*, 275 F. Supp. 833, 853 (E.D. La. 1967) (state may not induce, encourage, or promote private citizens to accomplish what it is constitutionally forbidden to accomplish).

204. 417 U.S. 556 (1974).

205. *Id.* at 566.

206. *Id.* at 569.

schools.²⁰⁷ By having stadiums and recreational fields provided for them, the segregated schools were able to save money and divert their own funds to other educational programs.²⁰⁸ This assistance tended to undermine significantly the city of Montgomery's obligation to maintain a unitary school system.²⁰⁹

Recently, the Supreme Court took a more aggressive role in eliminating racial segregation in private schools. Section 501(c)(3) of the Internal Revenue Code of 1954²¹⁰ provides that organizations which are operated exclusively for religious, charitable, scientific, or educational purposes are exempt from taxation.²¹¹ In *Bob Jones University v. United States*,²¹² two private religious schools, Bob Jones University and Goldsboro Christian Schools, were denied tax exempt status because of their racially discriminatory admissions policies.²¹³ When Bob Jones University sued to recover twenty-one dollars paid under the Federal Unemployment Tax Act (FUTA),²¹⁴ the Internal Revenue Service (IRS) counterclaimed for unpaid federal unemployment taxes in the amount of \$489,675.59 plus interest.²¹⁵ Goldsboro Christian Schools sued for a tax refund, claiming it had been improperly denied tax-exempt status.²¹⁶ The IRS counterclaimed for \$160,073.96 in unpaid social security and unemployment taxes.²¹⁷

207. *Id.* at 569.

208. *Id.*

209. *Id.*

210. I.R.C. § 501(c)(3)(1985).

211. *Id.* Section 501(c)(3) exempts the following organizations from taxation:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in . . . , any political campaign on behalf of any candidate for public office.

Id.

212. 461 U.S. 574 (1983).

213. Bob Jones University permitted the enrollment of unmarried blacks but denied admission to applicants engaged in interracial marriage. *Id.* at 580-81. Goldsboro Christian Schools maintained a racially discriminatory admissions policy based on its interpretation of the Bible that a biological mixing of the races violates God's command. *Id.* at 583 n.6.

214. I.R.C. §§ 3301-3311 (1985).

215. *Bob Jones University*, 461 U.S. at 582.

216. *Id.* at 584.

217. *Id.*

The Supreme Court held that neither Bob Jones University nor Goldsboro Christian Schools qualified as tax exempt organizations.²¹⁸ Writing for the Court, Chief Justice Burger stated that to qualify for the tax exemption, an institution must show that its activity is not contrary to public policy.²¹⁹ Justice Burger further stated that an educational institution which racially discriminates does not confer a public benefit²²⁰ and that "racial discrimination in education violates a most fundamental national public policy as well as rights of individuals."²²¹ The Court stated that the right of a student not to be segregated in schools on racial grounds is so fundamental and persuasive that it is embraced in the concept of due process of law.²²² Finally, the Chief Justice declared that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed with official approval, for the first 165 years of this Nation's history."²²³

VI. The Overbreadth Problem

Arguably, the Crenshaw County school board policy,²²⁴ which prohibited its employees from sending their children to private schools, is unconstitutionally overbroad.²²⁵ The Supreme Court has stated that a governmental purpose of controlling or preventing constitutionally regulated activities may not be achieved by means which are unnecessarily broad and thereby invade areas of protected freedoms.²²⁶ The right of parents to send their children to private schools is constitutionally protected.²²⁷ If the Crenshaw County policy were to be literally applied, a parent-teacher would be prevented from sending a retarded or handicapped child to a private institution for special treatment.²²⁸ A teacher who wanted to send his child to a

218. *Id.* at 584-85.

219. *Id.* at 585.

220. *Id.* at 595-96.

221. *Id.* at 593.

222. *Id.*, citing *Cooper v. Aaron*, 358 U.S. 1 (1958).

223. *Bob Jones University*, 461 U.S. at 604.

224. See *supra* notes 2-8 and accompanying text for discussion of the Crenshaw County school board policy.

225. An overbroad statute is one which "encompasses constitutionally protected conduct within its protective sweep." Note, *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609, 610 (1978).

226. *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

227. *Pierce*, 268 U.S. at 534-35.

228. See Comment, *Cook v. Hudson: The State's Interest in Integration Versus*

private school for religious training, even if the school did not racially segregate, would be prevented from doing so.²²⁹ Yet, according to *Pierce v. Society of Sisters*, a teacher has a constitutional right to do just that.²³⁰

Courts have held that an overbreadth challenge will succeed if it can be proved that the complainants' conduct is protected by the first and fourteenth amendments.²³¹ However, the right of parents to direct the education of their children should not be extended to give constitutional protection to parents who send their children to racially segregated private schools.²³² Therefore, the teachers in *Stough* cannot claim that the board policy prohibiting its employees from sending their children to private schools is overbroad.²³³

However, even when a regulation is not overbroad as applied to a particular litigant, that person has standing to assert the facial overbreadth of the same regulation.²³⁴ Litigants may challenge a statute to obtain a judicial determination that the statute's very existence may cause others, not before the court, to refrain from constitutionally protected activity.²³⁵

In *Broadrick v. Oklahoma*,²³⁶ three state employees of the State of Oklahoma were charged with violations of a state law which restricted the political activities of state employees.²³⁷ The Court rejected the overbreadth argument, drawing a distinction between

The First Amendment Rights of the Public Schoolteacher, 45 Miss. L.J. 953, 973 (1974).

229. *Id.*

230. *Pierce*, 268 U.S. at 534-535.

231. *Suddarth v. Slane*, 539 F. Supp. 612, 617 (W.D. Va. 1982) (police department regulation prohibiting members of police force from engaging "in criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, or other conduct prejudicial to the Department" was not unconstitutionally overbroad); *Wilson v. Swing*, 463 F. Supp. 555, 563 (M.D.N.C. 1978) (police department regulation requiring its members and employees to "conduct their private lives in such a manner as to avoid bringing the Department into disrepute" was not unconstitutionally overbroad).

232. See *supra* notes 144-191 and accompanying text for discussion of *Runyon v. McCrary* and *Roberts v. United States Jaycees*.

233. The public school teachers in *Stough* did not claim that the Crenshaw County School Board policy was overbroad. Telephone interview with Michael E. Jones, attorney for Crenshaw County School Board (Jan. 14, 1985).

234. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

235. *Id.* at 612.

236. See *supra* note 234.

237. *Broadrick*, 413 U.S. at 605-06. The pertinent sections of the statute prohibited state employees from soliciting or receiving contributions for any political organization or candidacy or from being a member of a political party. *Id.*

speech and conduct.²³⁸ Where it is conduct and not merely speech that is involved, the overbreadth of a statute must be *substantial* to be unconstitutional.²³⁹

The third circuit, in *Aiello v. City of Wilmington, Delaware*,²⁴⁰ addressed the issue of which the factors are relevant to a determination of whether a statute is substantially overbroad. First, a statute will be struck down for overbreadth if it lends itself to a substantial number of applications.²⁴¹ Second, the "likely frequency of a statute's conceivably impermissible applications"²⁴² is examined. Here, the third circuit suggested that if the frequency is relatively low, it is more appropriate to guard against the statute's conceivably impermissible applications through a case-by-case adjudication.²⁴³ Third, the nature of the activity or conduct sought to be regulated is scrutinized.²⁴⁴ Expression or conduct which has traditionally been given a high degree of first amendment protection is subject to close judicial scrutiny.²⁴⁵ Finally, the nature of the state interest is relevant.²⁴⁶ Here, the third circuit suggested that facial invalidation must be applied with restraint.²⁴⁷

In *Stough v. Crenshaw County Board of Education*,²⁴⁸ the teachers did not claim that the school board policy prohibiting them from sending their children to private schools was overbroad. The policy does, on its face, prohibit constitutionally protected activity.²⁴⁹ However in *Stough*, the policy has thus far been applied only to the plaintiff teachers who enrolled their children in Crenshaw Christian Academy, a racially segregated school. Teachers who desired to send their children to private schools other than Crenshaw Christian Academy were granted exemptions from the policy.²⁵⁰ Therefore, since the likely frequency of the policy's conceivably impermissible applications²⁵¹ is extremely low, the policy probably would not have been found to be unconstitutional.²⁵²

238. *Id.* at 615.

239. *Id.*

240. 623 F.2d 845 (3d Cir. 1980).

241. *Id.* at 854.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 855.

248. *See supra* note 1.

249. *See supra* notes 108-09 and accompanying text.

250. APPELLANT'S BRIEF at 6.

251. *See Aiello*, 623 F.2d at 854.

252. *Id.*

VII. Recommendations For the Future: No Fundamental Right to Send Children to Segregation Academies

Since the Supreme Court decision in *Pierce v. Society of Sisters*²⁵³ parents have had a fundamental right to control the education of their children.²⁵⁴ In *Stough*, the eleventh circuit assumed that the teachers' desire to send their children to a segregated academy was an exercise of this fundamental right.²⁵⁵ However, since *Runyon v. McCrary*, the activity of parents sending their children to racially segregated academies is not given constitutional protection.²⁵⁶

In light of *Runyon v. McCrary*, courts in the future should not uphold a fundamental right of parents to send their children to racially segregated private schools. Using the intermediate level of scrutiny, if a public school board initiated a policy which prevented its employees from sending their children to such institutions, the board would merely be required to show a rational connection between policy and the promotion of desegregation of the school system.²⁵⁷ Racially segregated academies have a negative impact on attempts by school boards to desegregate public schools.²⁵⁸ Therefore, even if courts find that public school teachers, as parents, do have a constitutional right to send their children to racially segregated academies, such a policy still can be upheld because it would further the public school board's compelling interest in eliminating discrimination in education.

VIII. Conclusion

While parents have a constitutional right to direct the education of their children, this right should not be extended to allow parents to send their children to private, racially segregated academies. An extension of this right encourages the creation of such institutions. If racially segregated private schools are permitted to flourish in this country, *de facto* segregated school systems will be perpetuated.

Stuart Melnick

253. 268 U.S. 510 (1925).

254. See *supra* notes 108-09 and accompanying text.

255. *Stough*, 744 F.2d at 1480.

256. See *supra* notes 144-73 and accompanying text.

257. See *supra* notes 45-56 and accompanying text.

258. See generally Tauber and James, *Racial Segregation Among Public and Private Schools*, 55 Soc. OF EDUC. 133, 134 (1982) (empirical study of impact of private schools on racial segregation in public schools).